IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 24/1998

Communidade of Cacoda,
Represented by its Attorney
Shri Pundalik Shambu Prabhu Desai,
Residing at H.No. Kakoda of
Quepem, Goa. ……. Appellant.

V/s.

1. Shri Vishnu Bhikaro Sawant,
Aged 60 years, H.No.264,
Kakoda of Quepem, Goa.

2. Shri Gajanan Vishnu Sawant,
Major, residing at Vadlimol,
Kakoda of Quepem Taluka. H.No. not known. ……. Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Mr. R. Menezes, Advocate for the appellants.

Mr. R. G. Ramani, Advocate for the respondents.

CORAM : F.I. REBELLO, J.

DATE : NOVEMBER 22, 2007.

ORAL JUDGMENT :

This appeal was admitted on the following substantial questions of law :

(1) Whether the suit for permanent and mandatory injunction the sanction is required from the Administrative Tribunal and such suit falling in the category preservatory (conservatoria) or executive (executive) no permission or authority is required from Administrative Tribunal but wherein suits the delay in filing it would cause an extinction of the right or guarantee the approval of the Administrator is necessary ?

(2) Whether the suit for permanent and mandatory injunction have within the category condenancao and therefore permission of Administrative Tribunal is necessary or not ?

The substantial questions arise from the following facts :

The appellant-plaintiff had instituted the suit for mandatory and permanent injunction being owners of the property surveyed under No.145/21 and 145/2 of Village Kakoda. It was the case of the plaintiffs who are appellants herein that on or about 24.10.1989, the defendant-/respondents herein criminally trespassed into the property surveyed under No.145/21 (which is the suit property) and dumped construction material therein and started making illegal construction, thereby encroaching upon an area of about 150 sq. metres of the suit property. The appellants contended that the respondents have no right, title or interest of any nature in the suit property and were rank trespassers. The appellants, therefore, prayed for

perpetual and temporary injunction against the respondents. The respondents, in their written statement contended that they have a structure in the suit property for about 20 years and the same was used for keeping agricultural equipments and other articles. It was contended that in a suit for restoration of possession, sanction of the Administrative Tribunal was required and in the absence thereof, the suit was untenable.

2. On the basis of the pleadings, several issues were framed. The relevant issues for the purpose of disposal of this appeal is, issue No.4, which reads as under :

> "Whether the defendants prove that no sanction as required under the provisions of Communidade Code has been obtained and hence the suit is liable to be dismissed ?"

Issue no.1 was regarding whether the respondent committed trespass in the property of the defendant. Issue no.2 was whether the appellants established that the respondents are rank trespassers and they have no right whatsoever in the suit property. Issue no.3 was whether the respondents prove that they have a structure in the suit property well over 20 years.

3. Considering the evidence, the trial Court by its Judgment and

Decree dated 30.3.95, decreed the suit by holding that the suit property admittedly belonged to the appellant and that the respondents constructed illegal structure in the suit property for the first time in October, 89. On the issue whether Article 9 of the Code of Communidades, suit was maintainable, the Court held that no such sanction was required. The suit was primarily for preserving the Communidade land from encroachment by the trespassers. Aggrieved respondents herein preferred an appeal being Regular Civil Appeal No.27/95 before the District Judge, Margao. On hearing the appeal, the order of the trial Court was set aside by the Judgment and Decree dated 6.5.88. The first appellate Court, on the issue of sanction for institution of the suit from the Administrative Tribunal in terms of Article 9 of the Code of Communidades, held that the suit essentially being a suit for mandatory injunction though the appellant had sought perpetual injunction as well, that could not be considered as a suit for conservation of the property of the Communidade and therefore, did not fall within the exceptions contemplated under Article 9 of the Code of Communidades. Reliance was placed on the Judgment of the of the Court of Judicial Commissioner in Second Civil Appeal No.15/74 in the case of ***Communidade of Velgem V/s. Ramnath Atmaram Palekar and ors.*** This Judgment and Decree of the first appellate Court is the subject-mater of the present appeal.

4. The main issue which will have to be considered is whether Article 9 of the Code of Communidades expressly or impliedly bars the jurisdiction of the Civil Court to entertain a suit filed on behalf of the Communidade, without obtaining sanction from the Administrative Tribunal. Article 9 of the Code reads as under :

> "The Comunidades should not file any suit without the consent of the Administrative Tribunal, except when the suit filed is of preservative or executive nature or when the delay in filing it may bring as a result the extinction of the right or any guaranty. In such cases the approval of the Administrator shall suffice."

5. Before answering the issue, it would be necessary to deal with the two Judgments which have been brought to my attention by the learned Counsel and which included the judgment in the second civil appeal which was the basis for the first appellate Court to allow the appeal. A suit had been filed by the Communidade for restraining the defendants from building a house on the suit land and for obtaining a mandatory injunction directing the defendant to demolish the said house which was partly built. The suit was decreed. In the appeal, the appellate Court came to the conclusion that the trial Court had not considered the question as to whether the suit fell within the purview of the second exception to Section 9 of the Code of

Communidades. The first appellate Court came to the conclusion that the suit was conservatory in nature. In the second appeal, the Counsel were at *ad idem* that in so far as perpetual injunction is concerned, the suit was conservatory in nature. There was however, a dispute as to whether the relief of mandatory injunction is conservatory. After considering the relevant provisions, it was held that in so far as mandatory injunction is concerned, the suit could not proceed without prior permission of the Administrative Tribunal. The appeals were accordingly disposed off. In other words, the Court of the Judicial Commissioner held that in so far as relief of mandatory injunction in a suit was not `conservatory' or `preservatory' and that relief could not have been sought without the permission of the Administrative Tribunal.

My attention was also invited to the order dated 27.6.1984 in Civil Revision Application No.156/1983 in the case of ***Shankar Pundalik Porob vs. Communidade of Usgao.*** In that case, no issue was decided. A learned Single Judge of this Court, however, on the aspect of Article 9 of the Code, remanded the matter for the purpose of deciding the nature of the suit.

It would, thus, appear that atleast the Court of Judicial Commissioner has taken a view that in so far as relief of mandatory injunction is concerned, that relief is not of a conservatory in nature and consequently, a suit where such relief is sought is not maintainable without

the permission of the Administrative Tribunal.

6. The exercise of jurisdiction by a civil Court is pursuant to the powers conferred on it under Section 9 of the Code of Civil Procedure. Section 9, reads as under :

> **"9. Courts to try all civil suits unless barred. -** The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred.
>
> Explanation (I) - A suit in which the right to property or to an office is contested in a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
>
> [Explanation II. - For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]"

It would thus be clear that a civil Court has jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. Does Article 9 of the Code of Communidades expressly bar the jurisdiction of the Civil Court in entertaining a suit? The

expression "express bar" would be when an Act contains a provision which specifically excludes the jurisdiction of a civil Court in respect of matters which are otherwise within its jurisdiction, namely the subject matter. An implied ouster would be in those cases where though there is no express provision, considering that a right is created under the Act not provided by civil law and the remedy is also provided, the jurisdiction of the civil Court would be impliedly barred. There are a catena of Judgments on the issue. Secondly, the Code of Communidades is an exercise in subordinate legislation. The provisions of the Code of Communidades, therefore, cannot override the provisions of the Code of Civil Procedure. On this aspect also if Article 9 is considered to be a bar on the civil Court exercising jurisdiction, it would be contrary to Section 9 of the Code of Civil Procedure. This argument must be rejected at the threshold. An exercise in subordinate legislation being pursuant to a power conferred by a statute, cannot override a substantive provision of law or for that matter a subordinate legislation cannot override the provisions of any primary legislation. Article 9, therefore, under no circumstances can be said to be an express bar on the civil Court to entertain a suit if, otherwise, a suit is cognizable by the civil Court.

7. The other aspect of the matter is what is the scope of Article 9 of the Code of Communidades. If the language of Article 9 is considered, it is

not a bar on the civil Court exercising jurisdiction, but a prohibition on the Communidade from filing a suit without the consent of the Administrative Tribunal, except for matters as set out therein. Therefore, Article 9 cannot be said to be a bar on the Civil Court exercising its jurisdiction.

We may look at the object of the Article from another aspect. Careful reference may be made to Article 349 of the Code of Communidades, which reads as under :

> " When the Comunidade decides to file any suit in the court as per Article 9, the "procurador" should apply to the Administrative Court stating the probable expenses of the suit the rights of the case in a proper form with document through the respective Administrator who will inform the matter. The Administrative Court will summarily decide after hearing the Attorney General and if it sanctions that the suit be filed it will authorize the expenditure that it thinks will be necessary."

Article 349 provides for sanctioning of expenses for prosecution of suits where permission is required. For such suits, therefore described under Article 9, the Communidade cannot spend money from its funds without the sanction taken in terms of Article 349. Article 9 and Article 349, therefore, read together would lead to the conclusion that it is a bar on the Communidades from incurring expenses from its funds in the event sanction

is not taken from the Administrative Tribunal. In my opinion, this is the only reasonable construction that will have to be given to Article 9, read with 349 of the Code of Communidades. If it is so read, it is neither a bar on the jurisdiction of the Civil Court to exercise its jurisdiction, nor for that matter a bar on the Communidades from filing a suit even if it not be of preservatory in nature. At the highest, if the Communidade files a suit and expends money towards it, the Communidade would not be reimbursed the amount expended towards filing and prosecution of the suit from its account. This in no manner excludes the jurisdiction of the civil Court. Therefore, as Article 349 was not considered when the Court of Judicial Commissioner disposed off the second appeal No.15/74, nor were the provisions of Section 9 of C.P.C. considered in the matter of ouster of jurisdiction, that judgment cannot be said to be a judgment of a co-ordinate Bench of this Court and on the principle of judicial discipline to be followed by another Co-ordinate Bench. The language of articles and the rule of construction which we have applied, would show that the jurisdiction of the civil Court is neither expressly or impliedly barred and that is always open to the Communidades, whether it be a suit of preservatory character or for that matter what may be said to be nonconservatory in nature to file a suit. Speaking for myself, I would say that there is no distinction between the suit for perpetual injunction and the suit for mandatory injunction, as both are with the object of preserving the

property. However, in my opinion, that is totally immaterial considering the object of Article 9, read with Article 349 of the Code of Communidades.

The conclusion which emerges from our discussion is that a civil Court would have jurisdiction to entertain a suit for a mandatory injunction, whether described as preservatory and or non-conservatory, irrespective of whether the sanction is taken from the Administrative Tribunal or not. The sanction is only for the purpose of expending monies.

8. The other consequential aspect of the matter is the scope of Article 349 of the Code of Communidades. Article 349 does not create any substantive right. It is merely procedural. In other words, even if a suit is filed by the Communidade in respect of its property without permission of the Tribunal, it will always be open to the Communidade if they have earlier not taken permission to apply post facto for permission, if permission is required under Article 349. Under Article 9, all civil suits which are to protect property or recover the property of the Communidade can be said to be `preservatory'.

9. Having considered and answered the effect and scope of Article 9, the substantial question of law as framed have to be answered. In so far as

question no.1 is concerned, it will have to be held that the question as framed would not arise as Article 9 is no bar on the filing of a suit as it does not exclude expressly or impliedly the jurisdiction of a civil Court. Similarly, in so far a question No.2 is concerned, substantial question as framed really would not arise considering the answer to the first question as it is immaterial whether suit is for relief of permanent or mandatory character. Having answered the issue as to scope and effect of Article 9, in my opinion, the learned first appellate Court was wrong in holding that the suit was not maintainable. However, it must be pointed out that the learned first appellate Court relied upon the judgment in second appeal, which as a subordinate Court it was bound to follow. Having explained the judgment in the Second Appeal and the discussion on Article 9 and Article 349, as also Section 9 of the C.P.C., this appeal will have to be allowed.

10. In so far as finding of facts are concerned, the finding recorded by the trial Court is that the respondents trespassed into the property of the appellant herein. This finding of fact was not argued in the appeal filed. The judgment of the first appellate Court indicates that various grounds were raised and the only question on which the appeal was argued was maintainability of the suit based on Article 9 of the Code of Communidades.

11. In the light of the above, the Judgment of the first appellate Court dated 6.5.98 is set aside and the Judgment of the trial Court dated 30.3.95 is restored. The appeal is allowed accordingly. In the circumstances of the case, there will be no order as to costs.

F.I. REBELLO, J.

ssm.